2013 WL 4777053 (Wis.Cir.)

For Opinion See 2013 WL 4792884 (Trial Order)

Circuit Court of Wisconsin.
Brown County
Warren TIMM and Jane Timm, Plaintiffs,
United Healthcare Services, Inc., Involuntary Plaintiff,
v.
NORTHEAST WISCONSIN RETINA ASSOCIATES, S.C., Proassurance Wisconsin Insurance Company, Inc. and Injured Patients and Families Compensation Fund, Defendants.
No. 11 CV 490.
February 13, 2013.

Brief Regarding Plaintiffs' Motions in Limine and Trial Brief

Hinshaw & Culbertson LLP, Attorneys for Defendants, Northeast Wisconsin Retina Associates, S.C. and ProAssurance Wisconsin Insurance Company, Inc., Patrick F. Koenen, State Bar No.: 1003209, Nadya E. Shewczyk, State Bar No.: 1049946, 100 W. Lawrence Street, Appleton, WI 54911, (920) 738-7550.

Case Code: 30104

Defendants Northeast Wisconsin Retina Associates, S.C. and ProAssurance Wisconsin Insurance Company, Inc., by their attorneys, Hinshaw & Culbertson LLP, hereby submit the following Brief in response to the plaintiffs' motions in limine and trial brief:

I. RESPONSE TO PLAINTIFFS' TRIAL BRIEF

In plaintiffs' Trial Brief, counsel asserts that the "burden with regard to proving whether defendant's negligence caused injury is less stringent because this is a medical malpractice case alleging negligently delayed or omitted treatment". This assertion is a misstatement of Wisconsin law. As such, these defendants submit the following to clarify Wisconsin law:

Introduction

The plaintiffs carry a two-fold burden of proving causation: First, they bear the "burden of production". If that is met, then they bear the "burden of proof" or "burden of persuasion". Both burdens are discussed below.

Discussion of the Burden of Production

To meet their burden of production, the plaintiffs must produce sufficient evidence from which the trier of fact could determine that the defendant's negligence was a substantial factor in causing the alleged injuries. In other words, "the plaintiff has the burden of producing evidence, *satisfactory to the judge,* from which a jury could reasonably find a causal nexus between the negligent act and the resulting injury." *Fischer v. Ganju,* 168 Wis.2d 834, 857 (1992)(emphasis added).

Specifically in this case, for the Timms to meet their burden of production, they must produce sufficient evidence to present to the trier of fact the question whether the defendants negligence was a substantial factor in causing the loss of Mr. Timm's right eye.

To satisfy the burden of production on causation and before sending this case to the jury, the plaintiff must show that "the omitted treatment was intended to prevent the very type of harm which resulted, that the plaintiff would have submitted to the treatment, and that it is more probable than not the treatment could have lessened or avoided the plaintiff's injury had it been rendered." *Ehlinger v. Sipes,* 155 Wis.2d 1, 13-14 (1990). If the Court is satisfied that the plaintiffs met their burden of production, the case survives a motion to dismiss or motion for directed verdict.

Discussion of The Burden of Proof or Burden of Persuasion

If the plaintiffs survive a motion to dismiss or motion for directed verdict, the defense will present their evidence and the case will go to the jury. For the jury to award damages, the plaintiffs must prove that the defendant's alleged negligence was, in fact, a substantial factor in causing the plaintiff's injuries. In other words, "if the plaintiff meets the burden of production and the causation question is submitted to the jury, the plaintiff has the burden of persuading the jury that the negligence in fact caused the injuries" or "that the defendant's negligence was a substantial factor in causing the harm." *Fischer,* 168 Wis.2d at 834 and 856-857.

It is important to note that the *Ehlinger* case cited by plaintiffs' counsel "addressed only the plaintiff's burden of production on causation necessary to survive a motion to dismiss or motion for directed verdict for insufficient evidence"; it did not alter the burden of proof. *Fischer,* 168 Wis.2d at 841. The *Ehlinger* case "expressly affirmed the substantial factor test". *Id.* at 857.

As set forth in the *Fischer* case, "[o]nce the question of causation is submitted to the trier of fact, the issue is the same as in other negligence causes of action: was the defendant's negligence a substantial factor in producing the plaintiff's injuries?" *Id.* at 842.

In deciding whether the plaintiffs met their burden of proof or persuasion, "[t]he trier of fact may consider evidence of the likelihood of success of proper treatment in determining whether the negligence was a substantial factor in causing the harm, and may yet conclude that it was not because the injuries would have occurred irrespective of the negligence." Additionally, if the jury determines the defendant's negligence was a substantial factor in causing the harm, "the trier of fact may also consider evidence of the likelihood of success of proper treatment in determining the amount of damages to be awarded." *Ehlinger,* 155 Wis.2d at 22-23.

Conclusion

In sum, the plaintiffs bear two burdens at trial; one being the burden of production to overcome a motion to dismiss or motion for directed verdict, and the second being the burden of proof or burden of persuasion which must be overcome for the jury to award damages. If the plaintiffs' survive a motion, the case will be submitted to the jury who will decide if the defendant's alleged negligence was a "substantial factor" in causing the harm before awarding damages.

II. RESPONSE TO PLAINTIFFS' MOTIONS IN LIMINE

The following sets forth the defendants' position regarding t he plaintiffs' Motions in Limine.

Response to Plaintiffs' Motion in Limine No. 1:

In filing this motion, the plaintiffs seek to preclude defendants from introducing evidence or argument that any actions or inactions of Warren Timm regarding his eye care *before December 4, 2008* constitute contributory negligence. It also seeks to preclude the defense from pointing to other health problems that Mr. Timm has, such as heart disease and diabetes, as evidence of contributory negligence.

The defendants do not interpret this motion as seeking to preclude, altogether, the evidence of Mr. Timm's pre-existing conditions or actions/inactions prior to December 4th. The defendants do not intend to introduce such evidence to show contributory negligence, and to that extent, the motion is not opposed. However, the defendants assert that the evidence is relevant to the plaintiffs' credibility and their damage claim, and will be offered for that purpose.

Response to Plaintiffs' Motion in Limine No. 2:

In filing this motion, the plaintiffs seek to preclude the defense from introducing evidence that the husband of the plaintiffs' expert testified as an expert in a medical malpractice case. The defendants do not intend to introduce such evidence, and to that extent, the motion is not opposed.

Response to Plaintiffs' Motion in Limine No. 3:

In filing this motion, the plaintiffs seek to preclude the defense from introducing evidence that Dr. Klein was sued by a patient. The defendants do not intend to introduce such evidence, and to that extent the motion is not opposed.

Opposition to Plaintiffs' Motion in Limine No. 4:

In a less than two page brief which lacks the support of Wisconsin case law, the plaintiffs seek to preclude the defense expert, Doug Elrick, from testifying at trial because his opinions are allegedly not based on sufficient facts or data, irrelevant, and unfairly prejudicial. The following is provided in opposition to the same:

The Expert's Background

Mr. Elrick is a digital forensic expert who performs computer forensic analysis. He is certified as a forensic computer examiner, advanced Windows forensic examiner, and electronic evidence collection specialist by the International Association of Computer Investigative Specialists. (*See* Ex. 1, Doug Elrick's Curriculum Vitae) [FN1] He is also a Microsoft Certified Professional. (*Id.*) He has trained college students, law enforcement, military, and corporate security personnel on how to complete computer forensic analysis. (*Id.*) And, he has lectured on computer investigations to organizations such as the FBI, US Department of Justice, German Border Police, Australia Federal and State Police, Malaysian Federal Police, and even the Milwaukee Bar Association. (*Id.*)

FN1. All cites to Attorney Nadya E. Shewczyk Affidavit dated 2/13/13.

Mr. Elrick was retained by the defendants in this case to analyze a floppy disk provided by the plaintiffs. On January 31, 2012, Mr. Elrick was identified by defendants as an expert witness in Digital Forensics. (*See* Ex. 2, Defendants' Designation of Expert Witnesses dated January 31, 2012) In the expert witness disclosure, it was explained that Mr. Elrick would "testify regarding the process of the retrieval of information from the plaintiffs'

floppy disk and an explanation of the data relating specifically to the 'diary' produced by the plaintiffs in this case." (*Id.*) He authored a report which summarized his analysis of the floppy disk and provided a copy of the documents found on the floppy disk. (*See* Ex. 3, Elrick Report) Plaintiffs' counsel chose not to take Mr. Elrick's deposition, so further explanation of his opinions as set forth in his report are not available.

Factual Background Regarding the Floppy Disk

Mrs. Timm created a document which summarized her view of Mr. Timm's well-being and the medical care provided to him between December 2008 and February 2009. This document, referred to as the "diary", was marked at her deposition as Exhibit 12. Mrs. Timm testified to the following regarding Exhibit 12:
1. She created the document (*See* Ex. 4, J. Timm Dep., p. 11, lines 6-9);
2. She began creating the document on December 7th (*Id.* at p. 11, lines 6-11);
3. The diary started off as handwritten notes, and then on December 12th Mrs. Timm started typing the notes (*Id.* at p. 11, line 19-p. 12, line 9; see also p. 12, line 18 -p. 13, line 1);
4. Mrs. Timm continued to add to the diary until February 16th (*Id.* at p. 13, lines 2-4);
5. She proofread the document, but never went back to edit or change any substance of something she previously typed (*Id.* at p. 13, line 15 - p. 14, line 8);
6. She reworded entries in the document, and it is impossible for her to determine which entries and when entries were changed (*Id.* at p. 93, lines 5-16);
7. Ex. 12 was created on a "white computer" the Timms had in their house, and saved on a floppy disk (*Id.* at p. 95, lines 10-25).

The floppy disk was subsequently produced and analyzed by Mr. Elrick. Mr. Elrick is being called to testify regarding his analysis of the floppy disk and documents located on it.

Wisconsin Law on Admissibility of Expert Testimony

Wisconsin now applies *Daubert* when determining whether an expert's opinions are admissible. *Wis. Stat. §§ 907.01, 902.02(1)* and *907.03* were revised to conform to Federal Rules of Evidence 701 through 703, as amended in 2000. 2011 Wisconsin Act 2, §§33-38; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The new rules apply to all actions filed on or after February 1, 2011. *2011 Wisconsin Act 2, §45.*

The Timms' claim was filed on February 24, 2011. (Complaint). Therefore, the current version of *Wis. Stat. §907.02* and *Daubert* determine whether the expert's opinions are admissible. Defendants' assert that Mr. Elrick's opinions are admissible because they are based on sufficient facts and data, relevant in that they will assist the trier of fact to understand the evidence and determine a fact in issue, not unfairly prejudicial, and pass the *Daubert* test.

The Wisconsin rule regarding the admissibility of expert testimony now states:
(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case., (Wis. Stat. §907.02)

The trial court determines whether an expert's testimony conforms to this standard so as to be admissible and its decision will not be upset on appeal absent an **abuse** of such discretion. *Kumho Tire v. Carmichael,* 526 U.S.

137, 152-53 (1999); *see also* 260 N. 12th Street LLC v. State of Wis. Dept. of Trans., 338 Wis.2d 34, 808 N.W.2d 372 (2011)(circuit court has "broad discretion" to admit expert testimony).

Daubert listed factors for a trial court to consider in determining whether an expert's opinions are sufficiently reliable to be admitted. Later cases added other factors that may also be considered. No single factor is necessarily dispositive of determining the reliability of a particular expert's testimony. *Fed.R.Evid. 702 advisory committee note* (2000 amendment).

The trial judge's task is to determine which factors to consider and whether the expert's testimony is reliable based upon those factors.

The factors include: (1) whether the expert's technique or theory can be or has been tested -- that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; (5) whether the technique or theory has been -generally accepted by the scientific community; (6) whether the expert is proposing to testify about matters growing naturally and directly out of research he has conducted independent of the litigation, or whether he has developed his opinions expressly for the purpose of testifying; (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; and (8) whether the expert has adequately accounted for obvious alternative explanations. *See Fed.R.Evid. 702 advisory committee note* on *Daubert* factors (2000 Amendment) for Nos. 1-5; *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) for No.6; *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) for No. 7; *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) for No. 8.

Applying Wisconsin law and the factors set forth above to Mr. Elrick's analysis and conclusions, his opinions are admissible and plaintiffs' motion in limine should be denied.

Applying Wisconsin Law to Mr. Elrick's Opinions

As explained above, a witness qualifies as an expert "by knowledge, skill, experience, training, or education," that is, if "he or she has superior knowledge in the area in which the precise question lies." *See Wis. Stat § 907.02; Estate of Hegarty v. Beauchaine*, 297 Wis. 2d 70, 160, 727 N.W.2d 857 (Ct. App. 2006)(citation omitted). It must be noted that the plaintiffs are not challenging Mr. Elrick's knowledge, skill, experience, training or education. Instead, they are challenging his opinions based on an alleged lack of sufficient facts and data, irrelevancy, and unfair prejudice.

To the contrary, Mr. Elrick's opinions are admissible because they are (1) based on sufficient facts and data, (2) relevant in that they will assist the trier of fact to understand the evidence and determine a fact in issue, (3) not unfairly prejudicial, and (4) pass the *Daubert* test.

First, Mr. Elrick's opinions are based on sufficient facts and data. He obtained a copy of the floppy disk, analyzed it using the reliable principals and methods he was taught and now teaches to professionals across the country and abroad, and applied his methods to the facts of the case to conclude that there are different versions of the document, none of which were created in December 2008.

Second, Mr. Elrick's opinions are relevant in that they impact the plaintiffs' credibility. The floppy disk con-

tained two documents, one saved as "TIM.DOC" and another saved as "DEC2008.DOC". As set forth in Mr. Elrick's report, both documents were created in January 2009, not while the treatment was taking place in December 2008 as stated by Mrs. Timm. Additionally, neither the TIM.DOC nor the DEC2008.DOC are identical to Exhibit 12. This shows that there are multiple versions of the document which are inconsistent with one another. Mr. Elrick should be permitted to discuss his analysis of the floppy disk and provide the foundation for the defense to demonstrate to the jury the inconsistencies in the documents.

His opinions are also relevant in that they will assist the trier of fact to understand the evidence and determine a fact in issue. The documents offer a day by day explanation of Mr. Timm's condition and the medical care he received. The -crux of this case hinges on what the plaintiffs' told the physicians at NEWRA and what the standard of care required based on the information that was received. His analysis will help the jury weigh the testimony of the parties and decipher what the physicians were told, which will aid the jury in assessing whether the physicians breached the standard of care.

Third, Mr. Elrick's opinions are not "unfairly prejudicial". His opinions are harmful to the plaintiffs in that the documents he retrieved from the disk are inconsistent and discredits the plaintiffs' testimony. Whether evidence is harmful to a particular party is not the test for admissibility. Instead, the evidence must be "unfairly prejudicial", and in this case it is not. Rather, precluding the evidence would be unfairly prejudicial to the defense and would mislead the jury into believing Mrs. Timm created a single, reliable document as events were unfolding.

Fourth, Mr. Elrick's opinions pass the *Daubert* test. He objectively analyzed the floppy disk as he was trained as a certified forensic computer examiner. His opinions are based on years of experience in his field and his familiarity with computer forensics. He will testify regarding the documents located on the disk, when they were created, how long they were opened for editing, and the discrepancies between them. The plaintiffs' motion presents no substantial basis to exclude any of Mr. Elrick's opinions, but rather presents the Court with the broadest of assertions. There is not any evidence that his analysis or conclusions are flawed. As such, Mr. Elrick's opinions are admissible.

Conclusion

Based on the foregoing, plaintiffs' Motion in Limine No. 4 should be denied, and Mr. Elrick should be permitted to testify at trial.

Dated at Appleton, Wisconsin, this 13th day of February, 2013.

HINSHAW & CULBERTSON LLP

Attorneys for Defendants, Northeast Wisconsin Retina Associates, S.C. and ProAssurance Wisconsin Insurance Company, Inc.

<<signature>>

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